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No. 89-1330

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, *et al.*,
Petitioners,

v.

TIMOTHY A. BROWN,
Respondent.

On Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO")—a federation of 90 national and international labor organizations having a total membership of approximately 14 million working men and women—is filed with the consent of the parties as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Section 401(c) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(c) ("LMRDA" or "the Act") places two duties on a labor organization with respect to requests by candidates for union office that the union mail campaign literature to its membership for the candidates during union elections.

First, § 401(c) requires a union to "comply with all reasonable requests" by candidates for union office that the union, "at the candidate's expense," use the union's mailing lists to distribute campaign literature to the membership.

Second, § 401(c) prohibits union "discrimination in favor of or against any candidate with respect to the use of lists of members." [1]

In addition, § 401(e) of the Act requires that, should a union adopt in its constitution or bylaws rules for distributing candidate literature in its elections, those elections shall, then, "be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of [the Act]." 29 U.S.C. § 481(e).

[1] Section 401(c), 29 U.S.C. § 481(c), provides in relevant part as follows:

> Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution.

2. In preference to being required to evaluate the "reasonableness" of each campaign literature distribution request by a candidate on an *ad hoc* basis, many unions have sought to assure fairness and consistency in the administration of their election processes by adopting in their constitution or bylaws electoral rules that define how and when candidates' campaign literature distribution requests should be made. Indeed, this approach has been endorsed by the Department of Labor's regulations, which state that "[i]n order to avoid charges of disparity of treatment among candidates, it is advised that a union inform all candidates in advance of the conditions under which distribution will be made and promptly advise them of any change in these conditions." 29 C.F.R. § 452.67.

This case concerns the status of such internal union rules in determining whether a candidate's literature distribution request is a "reasonable request" under LMRDA § 401(c). Specifically, the case presents the issue of whether—once a union adopts rules that are themselves fair, nondiscriminatory, reasonable and uniformly enforced—the union may judge the "reasonableness" of requests by candidates against those rules rather than on an *ad hoc* basis, so that candidate requests that conform to such rules may be treated as "reasonable" under § 401(c) and candidate requests that conflict may be treated as "unreasonable."

3. Petitioner International Organization of Masters, Mates and Pilots ("MM&P" or "the Union") denied a request by a self-proclaimed candidate for union office, Respondent Timothy A. Brown, that MM&P distribute his campaign literature months before the Union's con-

vention. The Union denied this request because, under its constitution, the convention marks the opening of the Union's officer election process, with all distributions of candidate materials to be made after the certification of candidates following the convention and to be handled by an independent and impartial balloting agency selected by the convention.

Throughout these proceedings the Union has sought to defend its decision on the basis that Brown's request—because the request conflicted with fair, nondiscriminatory, reasonable and uniformly enforced union election rules respecting literature distribution—was not a "reasonable request" under LMRDA § 401(c).

Each of the courts below rejected the Union's proffered defense on the ground that the § 401(c) inquiry into "reasonableness" is directed *only* at the candidate's request, which must be looked at on its own under the particular circumstances at the time and *without reference* to the status of the request under any union election rules, no matter how "reasonable" the rules may be.[2]

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[2] The district court had held that the reasonableness of the Union's rules was legally irrelevant (Pet. App. 3c) but then went on to hold that the Union's rules were unreasonable (Pet. App. 4c-6c). The Union appealed, asserting that each of these holdings was erroneous. With respect to the latter holding, the Union argued that the district court had held no hearings on the rules' reasonableness and had denied the Union's request to submit evidence on the reasons for and the operation of the rules.

On appeal, the Fourth Circuit's panel explicitly refused to assess the reasonableness of the Union's rules. In the panel's view, the statute's clear language establishes a "test [which is] not whether the union's rule was reasonable but whether the candidate's request was reasonable." Pet. App. 15a. To consider whether a candidate's request complied with internal union rules, the panel argued, would be to "stand[] the statute on its head . . . by making the issue the reasonableness of the union by-law rather than, as the statute declares . . . the reasonableness of the plaintiff's request." Pet. App. 14a.

The *en banc* majority adopted the panel majority opinion as its own. Pet. App. 2b.

In the Fourth Circuit's consideration of the case, dissenting judges on both the panel and the *en banc* court strenuously objected to this construction of § 401(c). In agreement with two other circuits which had previously confronted this issue, these judges concluded that if a union rule is "reasonable" in its general application, a candidate's request for literature distribution that fails to conform to the rule is not a "reasonable request." As Judge Hall stated, where that is the case, the request "threat[ens] the union's ability to organize its own internal affairs" in a fair and consistent manner (Pet. App. 19a), and therefore "a request for mailing that conflicts with the established internal procedures of a union is *per se* unreasonable unless the union's procedures are shown to be unfair or discriminatory" (Pet. App. 16a).[3]

Thus, this case, as it presents itself to this Court, raises a single legal question: whether a union—after adopting fair, nondiscriminatory, reasonable and uniformly administered union rules regarding how and when the union will distribute candidates' campaign literature—must, nonetheless, ignore such rules in determining whether candidate requests are LMRDA § 401(c) "reasonable requests" and must, accordingly, comply with requests despite their inconsistency with the union's reasonable rules.[4]

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[3] *See also* Pet. App. 3b-4b (*en banc*) (Phillips, J. dissenting) ("[i]f a union's general rule is not unfair or arbitrary in its general application, than a candidate's request to be exempted from its requirements is obviously 'unreasonable' "); *accord, Donovan v. Metropolitan District Council of Carpenters*, 797 F.2d 140 (3d Cir. 1986); *Marshall v. Provision House Workers*, 623 F.2d 1322 (9th Cir. 1980).

[4] As we have noted, the district court held that the union rules in question were not "reasonable" in terms of the LMRDA's policies. *See* note 2, *supra*. The Union appealed from this holding, but the court of appeals determined that the "reasonableness" of the rules was not legally relevant and that the Union violated the Act even if its rules were "reasonable". *Id.* Given that the question presented

As we now show, a union policy of promulgating and uniformly administering election rules respecting candidate literature distribution requests is fully consistent with the Act, so long as the rules themselves, judged in their general application, are consistent with the Act's policies. Unions attempting to comply with § 401(c) are faced with only a general mandate to comply with "reasonable" requests and a specific command to refrain from unequal treatment. Given this, it is perfectly sound for unions—like myriad other institutions faced with the need to limit official discretion—to particularize a "reasonableness" standard by adopting rules and eliminating reliance on individual union officers' subjective *ad hoc* determinations of "reasonableness." *See* pages 8-9, *infra*.

Such a union policy is fully consistent with the statutory language, since "reasonableness" is a standard that requires reference to the surrounding context, and here the surrounding context includes the union's legitimate interests in following clearly stated and consistently followed principles of administration and its decision to proceed by adopting rules in order to further such interests. *See* pages 9-10, *infra*. Indeed, this Court has expressly held that Congress' use of "reasonableness" standards in the LMRDA reflects a recognition of these legitimate institutional interests and a legislative determination in favor of union self-government and autonomy. *See* pages 10-11, *infra*.

The case for allowing unions to assess candidate literature distribution requests through rules is especially compelling, since—as Department of Labor regulations

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in this case concerns whether the court of appeals' legal theory is correct, this brief will assume *arguendo* that the union rules involved in this case are entirely reasonable. Of course, if this Court reverses the court of appeals' judgment, a remand for full litigation of this unresolved issue would be appropriate.

acknowledge—use of such rules promotes the democratic policies of the LMRDA as well. By assuring that elections will be conducted according to neutral principles adopted before specific candidates come forward, by eliminating officer discretion, and by giving public notice to candidates of their rights and obligations and the rights and obligations of their competitors, the use of rules in this context clearly promotes fair, open, and democratic union government. *See* pages 11-14, *infra*.

Respondent and the United States have in large part relied on various arguments that the statute's language and structure imply that a candidate has a right to have his request assessed without reference to any union rules. As we show, these arguments are erroneous. *See* pages 14-19, *infra*. Their major policy argument—that allowing unions to operate by use of rules will inevitably enhance the power of incumbent officials—is also entirely without merit, since the very essence of government by rules is to *diminish* official discretion and since any rules which fail to meet statutory standards would, of course, be fully subject to challenge. *See* pages 19-21, *infra*.

Moreover, as we show, given the structure of the statute and the relevant Labor Department regulation, the reading of the statute advocated by Respondent and by the United States leads to absurd results and undermines rather than promotes the statutory goal of assuring orderly and democratic union government. *See* pages 21-24, *infra*.

ARGUMENT

1. LMRDA § 401(c)'s open-textured requirement that unions must comply with "reasonable" candidate campaign literature distribution requests raises more questions than it answers—for union leaders attempting to comply with the provision, for union members attempting to assure such compliance, and for candidates seeking to ascertain their rights and to plan their campaigns. Only this much is plain: unions need *not* comply with *all* such candidate requests, but only with "*reasonable* requests", and the term "reasonable" is nowhere more precisely defined.

As one of the leading scholars on the LMRDA wrote of this provision soon after the Act was adopted, "No prescience is needed to foresee a host of difficult problems relating to the reasonableness of requests by candidates for union office for distribution of campaign literature and to the fairness of union officers' responses." Aaron, *The Labor Management Reporting and Disclosure Act of 1959*, 73 Harv.L.Rev. 851, 903 (1960). Given this vagueness, a union's determination to proceed on an *ad hoc* basis would create obvious problems of potential inconsistencies and of certain unpredictability which would tend to undermine confidence in the union's election processes and, as well, could generate frequent resort to litigation to resolve disputes.

The difficulties posed by *ad hoc* decisionmaking in this area are magnified further by the fact that § 401(c) also places on unions a legal duty to "refrain from discrimination" and to assure "equal treatment" in their handling of candidate literature distribution requests. Thus, for union leaders, *ad hoc* judgments as to "reasonableness" raise the likelihood of legal challenges—whether well-founded or not—complaining of unequal or discriminatory treatment in the management of union elections. For union members—and union candidates—*ad hoc* decisionmaking increases the difficulty of monitoring the union's actions to determine whether unequal treatment

is or is not occurring. Again, for all concerned, the result of *ad hoc* decisionmaking is all too likely to be institutional instability, loss of membership confidence and increased litigation and discord.

These sorts of problems, of course, are not unique to *ad hoc* decisionmaking under LMRDA § 401(c), although the often contentious and emotional nature of internal union politics tends to heighten their seriousness. Rather, these problems are commonplace throughout the society whenever administrative discretion is limited only by highly general standards. *See Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983) (*ad hoc* administrative decisionmaking under vague standards means that affected parties will have no actual notice of legal rights and requirements and that officials will have far greater discretion and far less guidance in their practices).

That being so, institutions of all kinds have recognized the advantages to all concerned of particularizing general standards through the promulgation of more specific rules, which serve both to provide public notice of relevant considerations and to channel and limit official discretion.

2. The language of LMRDA § 401(c) and the policies of the Act both fully support the proposition that a union may judge the "reasonableness" of a candidate's request in terms of its conformity with preexisting union rules, so long as those rules are themselves "reasonable" rules.

a. As we have noted, § 401(c) does *not* require that a union comply with *all* candidate requests that the union distribute literature, but only with "*reasonable*" requests. As Judge Hall explained in his dissent below, "the reasonableness of any action requires consideration of the underlying factual context." Pet. App. 18a. And, the relevant "factual context" here is that the union has adopted reasonable and uniformly enforced election rules, has legitimate interests in the enforcement of such rules,

and is faced with a request that did not conform to such rules.

The issue in this case is thus *not* whether the statute focuses on the "reasonableness" of candidate requests as opposed to the "reasonableness" of union rules; rather the question is whether—given the factual context of pre-existing and reasonable union rules—a candidate's request is "reasonable" when the request fails to conform to the rules' requirements.

The use of the word "reasonable" to modify the LMRDA's guarantees of union members' individual rights is common throughout this statute, in which virtually all such rights are stated in such non-absolute terms. *See, e.g.*, 29 U.S.C. § 411(a)(1) (guarantee of equal rights among union members subject to "reasonable" union rules); 29 U.S.C. § 411(a)(2) (union member's free speech rights subject to "reasonable" union rules regarding conduct of meetings and membership obligations); 29 U.S.C. § 411(a)(4) (union member's right to sue subject to exhaustion of "reasonable" union hearing procedures); 29 U.S.C. § 481(e) (union member's right to be candidate subject to "reasonable" qualifications).

This Court, in analyzing these LMRDA provisions has concluded that the required determination of what is "reasonable" turns on the various "policies that underlie the LMRDA." *Steelworkers v. Sadlowski*, 457 U.S. 102, 111 (1982). In this regard, this Court has emphasized that these underlying policies include *both* the establishment of minimum standards of democratic union governance in light of "revealed abuses" *and* the avoidance of any "unnecessary governmental intrusion into internal union affairs." *Wirtz v. Hotel Employees*, 391 U.S. 492, 496 (1968).[5] Given these policies the Court has

[5] *See also Furniture Moving Drivers v. Crowley*, 467 U.S. 526, 549 (1984) (in addition to concerns for specified democratic standards

made it clear that partial restrictions on individual LMRDA rights are "reasonable" when those restrictions are "reasonably related to the protection of the [labor] organization as an institution." *Steelworkers v. Sadlowski, supra*, 457 U.S. at 112.

Against this legal background it is simply beyond question that a union's interest in being able to structure its internal affairs through uniformly enforced rules—rather than by trusting in the *ad hoc* judgments of its officers—is an interest fully recognized under the Act, so long as the union's rules are reasonable when judged by reference to the statute's policies.

b. In the context here at issue, the union's interest in rulemaking and in uniform rule enforcement furthers *both* the union's interests in self-governance and autonomy *and* the broader public interest in more democratic union election procedures. Such rules—at least so long as the rules are reasonable—do *not* pit the interest in union self-governance *against* a competing interest in more democratic procedures.

"another primary goal of Congress was to maximize the amount of independence and self-government granted to unions"). This statute's concern for union self-government was also extensively discussed in *Steelworkers v. Sadlowski, supra* 457 U.S. at 117:

> In drafting [the LMRDA], Congress was guided by the general principle that unions should be left free to "operate their own affairs, as far as possible." S.Rep. No. 1684, 85th Cong. 2d Sess. 4-5 (1958). It believed that only essential standards should be imposed by legislation, and that in establishing those standards, great care should be taken not to undermine union self-government. Given certain minimum standards, "individual members are fully competent to regulate union affairs." *Ibid.* Thus, for example, in Title IV, which regulates the conduct of union elections, Congress simply set forth certain minimum standards. So long as unions conform with these standards, they are free "to run their own elections". *Wirtz v. Glass Bottle Blowers*, 389 U.S. [463] at 471 [(1968)].

Of course, the interest in union self-government is clearly furthered by permitting unions to make—and to give effect to—reasonable union rules. The union's rules —and the decision to proceed through rules rather than through officer discretion—are the result of the union's democratic political processes and, as such, reflect the judgments and experiences of union members themselves. Moreover, as Judge Seitz stated in determining that unions could enforce reasonable rules regarding candidate requests for literature distributions: "by minimizing judicial second-guessing, permitting such rules furthers the Act's policy of . . . minimizing government encroachment on union autonomy." *Donovan v. Metropolitan District Council of Carpenters*, 797 F.2d 140, 144 (3d Cir. 1986).[6]

Most to the point, however, *in the election context* a union's reliance on rules tends to serve the vital and democratic functions of making clear to all competing candidates that the electoral process will be conducted according to a previously established, publicly stated, and democratically determined plan on which all the competing candidates can rely. Such an approach, moreover, protects against the possibility that the electoral process will be distorted by the discretionary decisions of officials who, after the officials know who the candidates are, may have—or may appear to have—biases or conflicts of interest. In this way, prior establishment and uniform enforcement of reasonable election rules serve the broad democratic purposes of the LMRDA, and also serve the various other institutional and self-government interests of the union itself.

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[6] Also, quite obviously, permitting such rulemaking furthers certain general and wholly legitimate union institutional interests. Thus, for example, distribution rules assure that distribution requests will not cause unnecessary or unexpected burdens on the union or otherwise unduly interfere with the union's continuing operations as a collective bargaining representative.

That this view of the importance of reasonable election rules, uniformly-enforced, is consistent with the LMRDA's view of the requirements for proper elections cannot be doubted. To assure that electoral processes will be conducted according to a previously established, publicly known, and democratically determined plan, the LMRDA expressly requires that every union election "shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of [the LMRDA]." 29 U.S.C. § 481(e). Thus, the statute itself bars a union's waiver of otherwise valid election rules on the basis of *ad hoc* judgments in particular cases.

c. Another major purpose of the LMRDA is to prevent discrimination and unequal treatment. *See, e.g.*, 29 U.S.C. § 411(a)(1) (assuring union members an equal right to nominate candidates, vote, attend meetings, and otherwise participate in union deliberations); 29 U.S.C. § 481(c) (prohibiting union discrimination and requiring equal treatment in the handling of candidate requests for distributions of campaign materials).

Recognizing this policy and the beneficial effects of uniform rules in effectuating this policy—*viz.*, that adherence to rules prevents unequal treatment and the appearance of unequal treatment—the Department of Labor has explicitly advised unions to adopt and publicly announce rules on literature distribution in advance of elections. *See* 29 C.F.R. § 452.67 ("In order to avoid charges of disparity of treatment among candidates, it is advised that a union inform all candidates in advance of the conditions under which distribution will be made and promptly advise them of any change in those conditions.").

* * * *

Thus, the sum of the matter is that in the context of union elections, the promulgation of reasonable rules—and their uniform enforcement—is a salutary means of

promoting union democracy. Judicial recognition of the validity of such rules, moreover, furthers the Act's "general principle that unions should be left free to 'operate their own affairs, as far as possible,'" *Steelworkers v. Sadlowski, supra*, 457 U.S. at 117 (*quoting* S. Rep. No. 1684, 85th Cong., 2d Sess., 4-5 (1958)).

These things being so, there is simply no basis for treating a candidate's request as an LMRDA § 401(c) "reasonable request" when, in the words of Judge Phillips below, the candidate is requesting to be "made a special case, exempt from the requirements of general laws that are not unfair or arbitrary in their general application." Pet. App. 4b (*en banc*) (Phillips, J., dissenting).

3. Having said this much, we now show that none of the counter arguments that have been made regarding the language, structure and policies of the Act have merit.

a. We begin with the statutory language and structure.

First, the decisions below—and the arguments of counsel for the Respondent and the United States—proceed from the premise that the "plain meaning" of LMRDA § 401(c) *precludes* assessment of the "reasonableness" of candidate requests in terms of pre-existing union rules and instead *mandates* assessment of such requests on an *ad hoc* basis. The panel majority found this "plain meaning" in the fact that the statute refers to the "reasonableness" of "requests":

> The Act seems plain on its face: If the request to distribute . . . is "reasonable" the union is required to "comply with all [such] reasonable requests." This language conditions the right of the contesting union office seeker to have his campaign material distributed only on the reasonableness of his request. [Pet. App. 5a.]

Based on this, the panel majority concluded that the statutory language precluded union rules—however reasonable—from determining the outcome of a case.[7]

As we have indicated, however, this view of § 401(c)'s "reasonable request" language simply misconstrues the nature of the relevant inquiry, as well as misconstruing the language, structure and policies of the Act. The issue here is not, as the courts below would have it, whether the statute uses the word "reasonable" to modify "request" rather than "union rules"; it is whether a candidate's request under § 401(c) is a "*reasonable* request" when the request fails to comply with preexisting, reasonable and uniformly enforced union rules. For the reasons stated above, *see* pages 9-11, *supra*, it is sound to regard such rules as forming the relevant context for assessing the "reasonableness" of the request. And, it is equally proper to regard a nonconforming request—which would undermine fully legitimate union interests in the fair, orderly and consistent conduct of its elections, as an "unreasonable" request. *See* pages 11-14, *supra*.

Second, Respondent and the United States urge that the language of § 401(c) precludes any assessment of "reasonableness" in terms of union rules because the word "reasonable" in this provision is unaccompanied by any explicit reference to union rules, while in various other provisions of the Act the word "reasonable" is spe-

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[7] In this regard the panel stated:

> It certainly stands the statute on its head to . . . [make] the issue the reasonableness of the union by-law rather than, as the statute declares, making the issue the reasonableness of the plaintiff's request. The command of the statute may not legitimately be subordinated to the somewhat ambiguous language of a union by-law. Such a rule would render union by-laws superior to the congressional mandate and would provide dissident unions with a ready means for nullifying the statute's command. We are not disposed to uphold such a misconception of congressional power in this field. [Pet. App. 14a.]

cifically accompanied by references to union rules. Respondent's Memorandum in Opposition ("Resp. Mem.") at 9; United States Brief ("U.S. Br.") at 9-10.[8] Based on this language difference, they would have it that Congress must have intended that compliance with union rules is to play *no part* in assessing "reasonableness" under § 401(c). But this difference cuts the opposite way.

A statutory provision stating an individual right and then subjecting that right only to limits found in "reasonable rules" indicates, first, that in the absence of such rules, the right is unlimited, and, second, that no limit may be placed on such a right other than through preexisting rules; *viz.*, that such a right cannot be limited by *ad hoc* judgments. In contrast, a statutory provision stating a limited "reasonable" right is narrower, in that the right is limited even in the absence of the adoption of specific union rules.

The linguistic difference the Respondent and the United States emphasize, in other words, does *not* signify that the right in § 401(c) is more invulnerable to legitimate union restrictions than other rights; rather, the difference signifies that the right is more *vulnerable* to such restrictions. The statutory language does not indicate

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[8] *Compare* LMRDA § 401(c), 29 U.S.C. § 481(c) (union must comply with "reasonable requests" for distributions of candidate literature) *with* LMRDA § 401(e), 29 U.S.C. § 481(e) ("every member in good standing shall be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed"); LMRDA § 101(a)(1), 29 U.S.C. § 411(a)(1) (providing union members with equal rights and privileges to nominate candidates, to vote in elections or referendums, to attend union meetings and to participate in deliberations and voting at such meetings, "subject to reasonable rules and regulations in [a labor organization's] constitution and bylaws"). LMRDA § 101(a)(2), 29 U.S.C. § 411(a)(2) (providing union members with rights of free speech and assembly "subject to the organization's established and reasonable rules pertaining to the conduct of meetings" and the "responsibility of every union member toward the organization as an institution").

that union rules may not be considered in determining the limits of § 401(c); but, rather, that the union may place limits on candidate distribution rights either through rules or through *ad hoc* determinations.

Third, the United States also urges that the enforcement language of § 401(c) indicates that Congress intended that the "reasonableness" of a candidate's request should be assessed with a uniquely diminished concern for union self-government interests, because unlike most provisions of Title IV of the LMRDA, 29 U.S.C. §§ 481-483—which are enforced by the Secretary of Labor only after waiting for limited exhaustion of internal union procedures—a denial of a candidate's § 401(c) request can be raised in an immediate, private cause of action. U.S. Br. at 9-10. The United States urges that Congress' choice of a private enforcement scheme signifies Congress' belief that this right should outweigh competing union interests in self-governance. Once again, the difference the United States points to provides no support for the conclusion it urges.

As even the most cursory examination of Title I of the LMRDA reveals, the right at issue in this case is far from the only election-related right in the Act that is enforceable through immediate private suits. *See* LMRDA Title I, 29 U.S.C. §§ 411-415.[9] And, as this Court's Title I decisions make emphatically clear, Congress intended these rights—like Title IV rights—to be interpreted in a manner that recognizes the Act's policy of substantial deference to the principle of union self-government. *See*

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[9] Title I of the LMRDA, containing the "Bill of Rights of Members of Labor Organizations" assures each union member of certain legally protected rights, many of which relate to elections. *See, e.g.*, 29 U.S.C. § 411(a)(1) (equal right to nominate candidates, vote in elections, attend and vote in meetings and participate in deliberations); 29 U.S.C. § 411(a)(2) (right of free speech and assembly). Violations of Title I rights are enforceable through private causes of action by "[a]ny person whose rights . . . have been infringed." 29 U.S.C. § 412.

Steelworkers v. Sadlowski, supra, 457 U.S. at 111-112, 117 (Title I rights of free speech and association limited by Congress' policy of deference to union self-government interests). Congress thus saw *no inconsistency whatsoever* between the provision of certain private causes of action and the principle that the rights at issue in such actions are limited by the policy of minimizing interference in union self-government.

Moreover, as this Court has also recognized, Congress selected different enforcement schemes not on a hierarchy of rights but by reference to the *remedies* provided for in different causes of actions. And Congress' principle of selection rests on the LMRDA's general rule that to the extent possible *it is desirable to promote union self-government interests.*

Private preelection suits are therefore permitted only where the remedies available are "less intrusive" into union self-governance. *Furniture Moving Drivers v. Crowley,* 467 U.S. 526, 550 (1984). Where actions involve "more drastic remedies"—*viz.*, setting aside an election—suit may only be brought by the Secretary of Labor after allowing for internal union proceedings. 467 U.S. at 546. Thus, Congress did not intend union self-government interests to be accorded less weight where rights are subject to private enforcement.

Before turning to the major policy argument raised by Respondent and the United States, one last point should be emphasized concerning these arguments based on supposed implications of statutory language and structure. Each of these arguments is, in substance, an assertion that subtle distinctions between § 401(c)'s language and the other cited provisions' language should be construed to imply that the LMRDA's general balance of policy goals is not relevant with respect to assessing "reasonableness" under § 401(c). This Court, however, has specifically warned against such close textual parsing of the LMRDA and has emphasized instead that all

LMRDA interpretation should focus on the general policies underlying the Act. Because many provisions of the LMRDA were drafted on the spot during Floor consideration of this legislation, this Court has admonished that proper interpretations of the LMRDA "must look to the objectives Congress sought to achieve, and avoid 'placing great emphasis upon close construction of words.'" *Steelworkers v. Sadlowski, supra,* 457 U.S. at 111 (*quoting Wirtz v. Glass Bottle Blowers,* 389 U.S. 463, 468 & n.6 (1968)). *See also* Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959,* 58 Mich. L. Rev. 819, 852 (1960).[10]

b. Respondent and the United States argue that the LMRDA's policy of assuring fairness to non-incumbent candidates supports the decision below. Allowing unions to rely on rules, they argue, will inevitably and illegitimately increase the powers of incumbent leaders over challengers. Fairness to non-incumbents requires assessment of each candidate's requests for distribution of campaign literature on an *ad hoc* basis, rather than on the basis of each request's conformity with reasonable and pre-established union rules. Resp. Mem. at 11, U.S. Br. at 12. Again, the opposite is true.

First, in assessing this argument it is essential to recognize at the outset that a union's right to assess the "reasonableness" of candidates' requests in terms of the requests' conformity with "reasonable" union rules does *not* in any way preclude challenges asserting that the rules themselves are *not "reasonable"* in terms of the Act's policies.

Very simply stated, private parties cannot contract out of public law. Thus, to the extent that a union's election

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[10] Like many other LMRDA provisions, the language of § 401(c) is in large part a result of a floor amendment. *See* 105 Cong. Rec. 6727-6728 (1959), *reprinted in* 2 NLRB, Legislative History of the LMRDA 1240 (1959) (Sen. Javits' introduction of provision during floor debate).

rules regarding literature distribution unfairly favor incumbents—or otherwise conflict with the policies of the Act—the rules are invalid and may not be relied on. So long as a candidate may challenge the substance of such rules as conflicting with the Act's policies, there is simply no reason to believe that reliance on rules adopted beforehand—rather than *ad hoc* judgments at the time—will undermine the Act's policies of promoting democratic procedures.

Second, it makes no sense whatsoever to assert that the power of union officers is *increased* by the adoption and uniform enforcement of rules that, by their nature, *diminish* those officers' discretion. In the absence of rules of general application, it will normally fall on union officers to make *ad hoc* judgments concerning what constitutes a "reasonable" request. And, in the absence of the uniform enforcement of rules, it will normally fall on union officers to determine when exceptions are merited. Under such regimes, initial judgments depend on the officers' subjective—and possibly unarticulated—sense of reasonableness, and under such regimes monitoring of an officer's behavior for consistency is far more difficult. Rules are the classic means of restricting official discretion, and it defies logic to assert that giving effect to substantively reasonable union rules increases the powers of incumbent leadership.[11]

Third, a union's reliance on uniformly enforced election rules may serve a significant educational function that may in itself serve to open the union's political process.

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[11] As we have noted, the fact that governance through binding rules reduces discretion and thus promotes consistency and equal treatment is recognized in the LMRDA itself, *see* 29 U.S.C. § 401(e) (unions must conduct their elections in conformity with their constitution and bylaws), and in the relevant regulations of the Department of Labor, *see* 29 C.F.R. § 452.67 (advising unions to adopt clear rules on distribution of campaign literature "[i]n order to avoid charges of disparity of treatment among candidates").

The framing of prospective rules as part of the union's constitution or bylaws may focus the union's membership on the policy issue at stake. In that way, making the decision on the need for and the content of the rules provides an opportunity for public debate and participation not present in a system depending on *ad hoc* decisions by union officers.

Similarly, the very existence of explicit rules—rather than *ad hoc* practices—may serve to educate union members, including candidates and prospective candidates, on the union's election process. Candidates and prospective candidates may learn of their rights and obligations from the rules, and can rely on the fact that their competitors are equally subject to those rules. Members who are dissatisfied with the rules may—since the rules are explicit—challenge them more easily either through internal political processes or through legal proceedings.

In all of these ways, a regime of preexisting and uniformly enforced reasonable rules may serve to facilitate a political process in which the discretion of incumbent leadership plays less of a role than it otherwise would in determining the "reasonableness" of a candidate's request that the union distribute his literature. The assertions that such a regime enhances incumbent power simply make no sense.

c. As we have noted, the Department of Labor has, in its regulations respecting LMRDA § 401(c), explicitly advised unions to adopt rules regarding candidate literature distribution requests in advance of elections. And this advice is based on the proposition that such rules will *reduce* official discretion and thus the possibility—and perception—of unequal treatment among candidates. *See* 29 C.F.R. § 452.67. In this case, however, the United States seeks to reformulate its position, urging that unions may—and should—adopt rules regarding candidate requests for union distribution of campaign literature—recognizing that such rules have beneficial results—but

then asserting that unions may *not* legally follow such rules in any case where a candidate's non-complying request would be "reasonable" apart from consideration of its noncompliance with the rules. *See* U.S. Br. at 15 n.8. In essence, the United States asserts that unions should adopt rules but should not apply the rules so adopted. Such a view of the Act defies logic and, given the structure of the LMRDA, leads to an absurd result.

(i) The United States' position calls for a regime in which a union establishes a rule—presumably to reduce official discretion, provide candidates with notice of what they and their competitors can expect, and assure all that there will be equal treatment—and, at the same time, it requires union officers to waive compliance whenever the officers believe (or predict that a court will believe) that a non-complying request is otherwise reasonable. The illogic is clear: under such a regime officials would retain substantial unguided discretion, candidates would hardly be secure in knowing the rules that they and their opponents may follow, and candidates denied waivers would have little assurance that they have not suffered unfair and unequal treatment.

In short, such a regime undermines all of the beneficial results obtainable from rulemaking. The present position of the United States amounts to little more than an illogical assertion that unions should adopt rules while continuing to administer their elections without reference to them.

(ii) Of equal moment, the structure of the LMRDA would place any union which followed such a course in an intolerable legal position; a result Congress clearly could not have intended.

As noted, LMRDA § 401(e) mandates that all union elections "shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of [Title IV]." 29 U.S.C. § 481(e). Any union which adopts rules regulating campaign literature distributions must therefore follow those rules *unless to do so would violate the Act.* For example, a union that allowed literature distributions contrary to its rules would risk a challenge on behalf of a candidate who was thereby prejudiced, unless the LMRDA required the distributions.

Given § 401(e), a union that followed the United States' advice—*viz.*, a union with rules *and* with a policy of waiving those rules whenever a request seems otherwise "reasonable"—would act at its peril in close cases regardless of what choice the union might make. Any denial of a nonconforming request would violate § 401(c) if the request is subsequently held to have been "reasonable" despite its nonconformance with a reasonable rule. And, any grant of a nonconforming request would violate § 401(e) if the waiver of the rule is subsequently challenged and found not to have been legally required; *viz.*, if the noncomplying request is found *not* to have been "reasonable".

Under the legal regime urged by the United States, therefore, a union adopts rules on this subject only at the price of risking liability whenever the union is requested to waive its rules, however the union may treat the request. Under such a regime, few, if any, unions will adopt campaign material distribution rules.[12]

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[12] The United States argues that the position of the Department of Labor in favor of Respondent is entitled to deference from this Court. U.S. Br. at 15-16. No such deference is owed. As we have repeatedly noted, the Department of Labor has, in its authoritative regulations, advised unions to adopt rules. 29 C.F.R. § 452.67. And none of the administrative materials cited by the United States contain any statement that unions should not rely on or enforce such rules when confronted with nonconforming candidate requests. The principle regulations relied on by the United States contain no language other than the unexplained statutory "reasonable request" language, and thus, they hardly advance the inquiry. *See* U.S. Br. at 15 (*citing* 29 C.F.R. §§ 452.67, 452.69). The administrative letter and the other regulations cited by the United States contain no

d. Ultimately, the positions of Respondent, the United States, and the courts below rest on the notion that the LMRDA is a statute based on pervasive distrust of the ability of unions to structure their own affairs fairly and to conduct their own elections according to democratic principles. That is *not* the theory of the LMRDA. *See* pages 9-11 & n.5, *supra*. All policies of the LMRDA concerning candidates' rights to have their campaign materials distributed are fully accounted for as long as a candidate may challenge a rule that is enforced against him as representing a policy inconsistent with the Act. The LMRDA's policies are furthered not at all by precluding unions from adopting reasonable rules on this subject and uniformly enforcing such rules in the course of conducting their elections.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings regarding the "reasonableness" of the Union's rules.

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discussion of the legal issue before the Court, but are only relevant on the reasonableness of the specific MM&P rule. *See* U.S. Br. at 15 (citing private administrative letter and 29 C.F.R. §§ 452.79 and 452.80).